KOAY TUAN & ANOR.

v.

ENG CHONG HOW & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 429 OF 1977]
28 MARCH 1986

TORT: *Negligence - Claim for damages by estate of deceased for loss of expectation of life - Claim for damages by dependants for loss of support by deceased killed during course of employment by person who was not his employer - Deceased covered by SOCSO - Widow received benefit under SOCSO - Whether claims barred under SOCSO.*

The plaintiffs as the administrators of the estate of the deceased claimed damages for loss of support for the dependants of the deceased under s. 7, Civil Law Act 1956 and for loss of expectation of life for the estate under s. 8 of the said Act. The deceased was working at a sawmill as a supervisor at the material time. On 20 December 1984 he was killed when a lorry driven by the first defendant who was the agent and servant of the second defendant collided into him. The deceased was insured under the Employees Social Security Act 1969 (hereinafter referred to as the SOCSO Act) by his employer. The first plaintiff was the widow of the deceased and she received dependants' benefit under s. 26 of the SOCSO Act. The first defendant and second defendant were not the employer of the deceased. The issue was whether the plaintiff's claim was barred under s. 42 of the SOCSO Act.

Held:

[1] The claim for damages in respect of a dependency claim under s. 7, Civil Law Act 1956 was similar to the dependants benefit under s. 15 (1)(c) of the SOCSO Act. That claim was barred by s. 42 of the SOCSO Act.

[2] The damages for loss of expectation of life under s. 8 Civil Law Act 1956 formed a part of the assets of the estate of the deceased and was not similar to the dependants' benefit under s. 15(1)(c) of the SOCSO Act. That claim was not barred by s. 42 of the SOCSO Act.

[Judgment for the plaintiff with costs.]

Cases referred to:

Chin Choy & Ors. v. Collector of Stamp Duties [1979] 1 MLJ 69
Walsh v. Secretary of State for India [1863] 10 HL Cas 367
Hough v. Windus [1884] 2 QBD 224
David v. Dasilva [1934] AC 106
O'Connor v. Isaacs [1956] 2 QB 288
Tan Peng Loh v. Lee Aik Fong & Anor. [1982] 1 MLJ 75
Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd. [1982] 1 MLJ 80
Jewish Blind Soceity v. Henning [1961] 1 All ER 47
Walker v. Wood [1962] 3 All ER 188

Legislation referred to:

Civil Law Act 1956, ss. 7, 8
Employees' Social Security Act 1969, ss. 2(1), 15(1)(c), 26(1), (2), 31, 42

For the plaintiffs - S. Asamaley; M/s. Karpal Singh & Co., Penang
For the defendants - R. J. Manecksha; M/s. Lim Kean Siew & Co., Penang

JUDGMENT

Edgar Joseph Jr J:

In this case, the two questions of law of critical substance, which arise for decision, are not only novel but also of general importance and may be stated thus:

(a) Whether an award of general damages for loss of support recoverable by the dependants of a deceased under s. 7 of the Civil Law Act 1956, from a party who was neither his employer nor his co-worker, amounts to "a similar benefit admissible under the provisions of any other written law" within the meaning of s. 42 of the Employees' Social Security Act 1969 ("the Act") and

(b) If so, whether an award of general damages for loss of expectation of life recoverable by the estate of a deceased person under s. 8 of the Civil Law Act 1956, from a party who was neither his employer nor his co-worker, amounts to "a similar benefit admissible under the provisions of any other written law" within the meaning of s. 42 of the Act?

The material portions of the Act are as follows:

Section 15(1)(c)

Subject to the provisions of this Act, the insured persons, their dependants or the persons hereinafter mentioned, as the case may be, shall be entitled to the following benefits, namely:

(c) periodical payments to such dependants of an insured person who dies as a result of an employment injury sustained as an employee under this Act, as are entitled to compensation under this Act (hereinafter referred to as dependant's benefit);

Section 26(1)

If an insured person dies as a result of an employment injury sustained as an employee under this Act (whether or not he was in receipt of any periodical payment for temporary disablement in respect of the injury) dependants' benefit at the rates specified in the Fourth Schedule shall be payable to his dependants as follows:

(a) to his widow during life or until remarriage and, if there are two or more widows, the widow's share of dependants' benefit specified in the Fourth Schedule shall be divided equally between the widows;

(b) to each legitimate or legally adopted son until he completes his fourteenth year of age:

Provided that in the case of a legitimate or legally adopted son who is infirm and who is wholly dependent on the earnings of the insured person at the time of his death, dependants' benefit shall continue to be paid while the infirmity lasts;

(c) to each legitimate or adopted unmarried daughter until she completes her fourteenth year of age or until marriage, whichever is earlier:

Provided that in the case of a legitimate or adopted unmarried daughter who is infirm and is wholly dependent on the earnings of the insured person at the time of his death, dependants' benefit shall continue to be paid while the infirmity lasts and she continues to be unmarried;

And provided further that the Organisation may continue such benefit to any legitimate or adopted son or legitimate or adopted unmarried daughter until he or she completes the sixteenth year of age if such son or daughter continues education to the satisfaction of the Organisation.

Section 26(2)

If an insured person who dies as a result of an employment injury does not leave a widow or legitimate or adopted child, dependants' benefit shall be payable to the other dependants as specified in para. (c) of sub-section (3) of s. 2 at the rates and for the duration specified in the Fourth Schedule.

Section 2(11)

"insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act,"

Section 31

An insured person or his dependants shall not be entitled to receive or recover **from the employer** of the insured person -

(i) any compensation under the Workmen's Compensation Ordinance 1952, or

(ii) damages under **any other law** for the time being in force.

in respect of an employment injury sustained as an employee under this Act."

Section 42

When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other **written law.**

The essential facts, as to which there are no dispute and which have given rise to the above questions of law, may be stated shortly thus:

The plaintiffs herein are the Administratrix and Administrator of the Estate of one Teh Keat Leng, deceased, who worked as a supervisor for Seng Hing Sawmill.

On 20 December 1974, at about 3.00 p.m. while the deceased was working at the sawmill, a lorry bearing registration number BAB 4102 ("the lorry") owned by the second defendants, Lim Chin Joo trading as Chin Joo Sawmill and driven by the first defendant as the servant and/or agent of the second defendant stopped at the sawmill yard to deliver a timber load to Seng Hing Sawmill. The deceased together with other workers were engaged in unloading the timber from the lorry. After they had unloaded some of the timber at one spot the lorry had to be moved to another spot for further unloading; the load that remained on the lorry being then unsecured. When the first defendant moved the lorry for this purpose, the timber load tumbled out and fell on the deceased killing him instantaneously.

As the deceased was insured under SOCSO by his employer, Seng Hing Sawmill, the first plaintiff who is the widow of the deceased, has been and still is receiving "dependants' benefit" under s. 26 of the Employees' Social Security Act 1969, from 21 December 1974 and thereafter. She presently receives RM240 to RM248 per month.

The plaintiffs have pursuant to the provisions of s. 7 and 8 of the Civil Law Act 1956, brought this suit claiming damages for the dependants of the deceased as well as on behalf of the estate of the deceased, against the first defendant as driver of the lorry and the second defendant as his employer.

In considering both the questions of law posed above, I have kept in the forefront of my mind on the one hand, the well known canon of construction enuciated by Abdoolcader FJ (as he then was) in *Chin Choy & Ors. v. Collector of Stamp duties* [1979] 1 MLJ 69,

> ... that the meaning and intentions of a statute must be collected from the plain and unambigous expression used therein rather than from any notions which may be entertained by the Court as to what is just and expedient ... However unjust, the arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words,

and, on the other hand, the rule that statutes which encroach on the rights of a subject, whether as regards person or property (and a chose in action is a species of property) are subject to a strict construction in the same way as penal statutes. It is also a settled rule that such statutes should be construed, if possible, so as to respect such rights *(Walsh v. Secretary of State for India* [1863] 10 HL Cas 367, per Lord Westbury; *Hough v. Windus* [1884] 2 QBD 224 per Bowen LJ) and, if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted *(David v. Dasilva* [1934] AC 106; *O'Connor v. Isaacs* [1956] 2 QB 288).

This appears to have been the approach adopted by the Federal Court in *Tan Peng Loh v. Lee Aik Fong & Anor.* [1982] 1 MLJ 75 when it was held that although a plaintiff was barred from receiving or recovering damages from his employer by reason of the provisions of s. 42 of the Act, there being an absence of express exclusion of claims against fellow employees in the Act, his right to recover damages at Common Law from fellow employees remained intact.

I now turn to consider the specific questions of law raised.

As to question (a), I have perused the judgment of Hashim Yeop A. Sani J (as he then was) in *Che Noh bin Yacob v. Seng Hing Rubber (M) Sdn. Bhd.* [1982] 1 MLJ 80 but I do not find it of assistance because there, unlike here, the Common Law claim was made by the plaintiff insured **against his employer,** and was clearly barred by s. 31 of the Act.

The words "similar benefit" in s. 42 of the Act must mean a benefit similar in kind. There is authority for saying that the expression "of a kind similar to" means similar in the purpose for which it is used *(Jewish Blind Society v. Henning* [1961] 1 All ER 47; *Walker v. Wood* [1962] 3 All ER 188, 190). By the same token, both categories of payment are intended for the benefit of dependants of the deceased.

I can therefore see no distinction in principle between damages under s. 7 of the Civil Law Act, 1956, and "dependants' benefit" under s. 26 of the Act, even though the definition of dependants under the former statute is not as wide as under the latter.

It is my opinion, therefore, that an award of general damages in respect of a dependancy claim under s. 7 of the Civil Law Act 1956, being intended to compensate **the dependants** of the deceased in respect of **loss of support** is similar to "dependants' benefit" within the meaning of s. 15(1)(c) of the Act.

Accordingly, the bar imposed by s. 42 of the Act is available to the defendants herein in so far as the claim for loss of dependancy under s. 7 of the Civil Law Act 1956, is concerned.

I would therefore answer question (a) in the affirmative.

The plaintiffs are, however, on firmer ground as regards question (b).

The damages awarded in respect of a claim for the loss of expectation of life under s. 8 of the Civil Law Act 1956, do form part of the assets of the estate in which creditors and beneficiaries under the deceased's will, whether dependants or not, or indeed even strangers,

may be interested. Similarly, in the event of the deceased's dying intestate, such damages also do form part of the assets of the estate in which creditors and any of the next-of-kin of the deceased, whether dependants or not, may be interested. The fact that the dependants may succeed to such damages is therefore purely fortuitous.

This is in striking contrast to damages for loss of support under s. 7 of the Civil Law Act 1956, which go directly to a specially defined class of dependants of the deceased and form no part of his estate. In the event, therefore, of the deceased's estate proving to be insolvent, such damages would not go to his trustee in bankruptcy.

I cannot therefore equate an award for damages for loss of expectation of life made pursuant to the provisions of s. 8 of the Civil Law Act 1956, with "dependants' benefit" within the meaning of s. 15(1)(c) of the Act. I fail to see any connection or nexus between the two to satisfy me that they are similar in character. The fact that the damages awarded under this head may eventually go to the dependants is, as I have said, purely fortuitous and besides the point. What is material is not so much the destination of these damages as their character.

It is my opinion, therefore, that an award of damages in respect of such a claim is not a similar benefit within the meaning of s. 42 of the Act.

Accordingly, the bar imposed by s. 42 of the Act is not available to the defendants herein in so far as the claim for loss of expectation of life under s. 8 of the Civil Law Act 1956 is concerned.

I would therefore answer question (b) in the negative.

In these circumstances, the action would ordinarily proceed on its merits only as regards the claim under s. 8 of the Civil Law Act 1956. However, I was informed by Counsel that should either or both the above questions be resolved in favour of the plaintiffs, then, liability for negligence and the quantum of damages would be admitted. That being the case, all that remains for me to do will be to enter judgment for the plaintiffs in the sums agreed and for costs.

Also found at [1988] 1 CLJ 816